**U.S. Department of Labor**

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**Issue Date: 17 June 2005**

CASE NO.: 2005-LHC-624

OWCP NO.:07-165615

IN THE MATTER OF

LOUIS A CHARLES, JR.,
Claimant

v.

UNIVERSAL MARITIME SERVICES, INC.,
Employer

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.,
Carrier

APPEARANCES:

V. William Farrington, Jr., Esq.
On behalf of Claimant

Maurice E. Bostick, Esq.
On behalf of Employer/Carrier

## DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et seq., brought by Louis A Charles

(Claimant) against Universal Maritime Services, Inc., (Employer) and Signal Mutual Indemnity Association, LTD. (Carrier) The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before the undersigned on March 7, 2005 in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their respective positions. Claimant testified and introduced 12 exhibits which were admitted including the medical records of Drs. Paul Naccari, Warren Bourgeois, Dwight A. Green, and Edward Boos, an MRI of the right shoulder dated September 1, 2003, deposition and report of Dr. Najeeb W. Thomas, MRI of cervical spine dated April 25, 2005, bone imaging study dated April 21, 2005, and records from Lindy Boggs Medical Center.[1] Employer called 3 witnesses (Max R. Sanders, Jr., Steve Smith, and Nancy T. Favaloro) and introduced 20 exhibits which were admitted including Claimant's responses to discovery, various DOL forms, Employer payroll records, records from Global Safety and Security and Kroll Laboratory Systems, medical records from Drs Robert Steiner, Paul Naccari, Warren Bourgeois, Robert Brousse, Edward Boos, Monroe Laborde and William George; deposition of Dr. Bourgeois; medical records from Pendelton Memorial Hospital, Greater New Orleans Surgery Center and Crescent City Physical Therapy, a functional capacity evaluation by Billy Naquin; and a vocational rehabilitation report of Nancy Favaloro.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor, and the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

## I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant was injured on October 7, 2002 in the course and scope

[1] References to the transcript and exhibits are as follows: trial transcript- Tr.____; Claimant's exhibits- CX-___, p.___; Employer exhibits- EX-___, p.___; Administrative Law Judge exhibits- ALJX-__; p.___.

of his employment when an Employer/Employee relationship existed.

2. Employer was advised of the injury on October 7, 2002.

3. Employer filed notices of controversion on January 9, 2004 and May 20, 2004.

4. An informal conference was held on June 9, 2004.

5. Claimant's average weekly wage at the time of injury was $807.45.

6. Employer paid temporary total disability from November 21 2002 to October 11, 2004 for a total of 98 5/7 weeks at $53.30 per week for a total of $53,137.75, plus permanent partial disability from November 1, 2004 to present and continuing.

7. Claimant reached maximum medical improvement (MMI) for the right shoulder on January 26, 1994.

## II. ISSUES

The following unresolved issues were presented by the parties:

1. Maximum medical improvement concerning alleged injuries to head, face, jaw, right ear and eye.

2. Intoxication as sole cause of injury.

3. Causation of injury to head, face, jaw, right ear and eye.

4. Claimant's residual earning capacity.

5. Attorney's fees.

## III. STATEMENT OF THE CASE

### A. Chronology:

Claimant is a 47 year old male born on May 9, 1958. He has a 12th grade education plus one year of college. Claimant has worked as a longshoreman since 1980. Before this he drove trucks and taxis, washed cars and was a waiter. On Monday, October 7, 2002, ILA local vice president, Gregory Lee called Claimant at about 7:30 am informing him that a truck driving job was available at the France Road terminal. Claimant arrived at the terminal and began switching containers from the warehouse to the yard. At about 10:30 am, while in the process of opening a container door prior to switching, Claimant was struck on the right side of his head, neck and shoulder by a wooden pallet board that was sitting inside the container. (Tr. 14-18).

Claimant reported the incident and went to the Occupational and Industrial Medicine Clinic where he was treated by Employer's doctor, Dr. Paul F. Naccari who treated Claimant, performed a drug screen, diagnosed strained right shoulder and strained cervical spine, and returned Claimant to work with a follow up visit for November 5, 2002. (CX-1, EX-7, p. 2). On October 11, 2002, a drug screen confirmed the presence of cocaine in Claimant's system. (EX-5 and 19).

Dr. Naccari ordered a cervical and a right shoulder MRI which was performed on October 24, 2002 and October 31, 2002. The cervical MRI showed a diminished lordotic curve, slight degenerative disc type findings with no evidence of disc herniation, stenosis or other abnormality with Claimant complaining of right sided head, neck, and shoulder pain radiating down arm and back. The right shoulder MRI showed severe tendonitis and partial tearing of supraspinous tendon with a tear of the anterior superior glenoid labrum. (EX-15, pp. 1, 2). A subsequent MRI right shoulder arthrography showed a "near complete tear of the supraspinatus with retracted, frayed edges. (EX-15, p. 3).

When the MRI results came back, Dr. Naccari referred Claimant to orthopedist Dr. Steiner for further evaluation. (EX-7, p. 4). Dr. Nacarri saw Claimant and prepared a report dated November 21, 2002 in which Claimant related the accident, denied prior neck and shoulder problems and complained of right shoulder pain and weakness with a recurrent stabbing type pain along the right side of neck and trapezius region.[2] Upon palpation Claimant reported

[2] Although Claimant denied prior neck and shoulder problems medical records from Dr. J. Monroe Laborde show Claimant treated for cervical radiculopathy and tendonitis of the right shoulder in July and August 1997, followed by injections for neck pain radiating into the trapezius due to degenerative arthritis in December 1998 which caused Claimant to miss work and surgery to remove lipoma over the left scapula in January 1999. (EX-14).

tenderness and tightness in the right cervical and trapezius regions. After reviewing the medical records Dr. Steiner opined that Claimant sustained a contusion to the cervical region and a rotator cuff tear to the right shoulder that required surgery. (EX-6).

Following Dr. Steiner's assessment Claimant chose orthopedist, Dr. Bourgeois, as his treating physician. Upon his first visit of December 17, 2002, Claimant complained of right shoulder and neck pain since his injury of October 7, 2002. The examination showed right shoulder weakness due to rotator cuff tear confirmed by MRI. (EX-15; CX-4). Dr. Bourgeois found Claimant unable to return to work and unable to perform any manual work until the rotator cuff was surgically repaired. (EX-9, p. 1). On a return visit of January 17, 2003, Dr. Bourgeois scheduled surgery for January 27, 2003. (EX-9, p. 2).

On January 27, 2003, Claimant underwent an arthroscopic debridement of torn labrum and torn rotator cuff, subacromial decompression with release of coracoacromial ligament, open repair rotator cuff tear of right shoulder. (EX-9, p.3; EX-16). This was followed by therapy and visits on February 3, March 27, April 24, May 26, June 23, September 23, November 3, and December 15, 2003, and January 26, February 10, March 1, April 5, May 3, and September 9, 2004. (EX-9, pp.3-21; EX-17; CX-2 and 6). By May 26, 2003, Dr. Bourgeois had limited Claimant to sedentary activity with no overhead lifting or reaching and on January 2, 2004 declared Claimant at MMI for his right shoulder. Prior to this assessment Dr. Bourgeois had Claimant undergo electromyography of the upper extremities which studies were normal. (EX-8).

In a February 10, 2004 letter to the carrier, Dr. Laborde noted that since the accident of October 7, 2002 he had been treating Claimant for persistent right shoulder problems, but that recently as of December 15, 2003 Claimant had voiced new complaints of pain on the right side of the head, neck and right ear for which Dr. Laborde suggested evaluation by an otolaryngologist. (Ex-9, p. 14). By April 5, 2004, Dr. Laborde noted painless range of motion of the right shoulder. (EX-9, p, 16). On a letter dated, April 6, 2004, Dr. Laborde informed carrier that a functional capacity evaluation was not necessary and that Claimant was cleared to return to his former job once Claimant's TMJ problem was resolved. (EX-9, p 17).

On the May 3, 2004 visit Dr. Bourgeois noted that Claimant continued to complain of right head, neck pain with exertion and noted that Claimant had a permanent partial impairment rating which he subsequently in a June 9, 2004, letter stated prevented Claimant from returning to his former longshore work.

(EX-9, p. 20). As of the September 9, 2004 visit Dr. Bourgeois restricted Claimant to 60 pounds noting that he was awaiting an evaluation and treatment of Claimant's TMJ problem which Dr. Bourgeois believed to be causally related to the October 7, 2002 accident. Dr. Bourgeois confirmed the60 pound lifting restriction stating that facial, TMJ pain limited Claimant. (CX-8).

On May 7, 2004, ear, nose and throat specialist, Dr. Robert G. Brousse, evaluated Claimant for ear and jaw complaints. On examination Dr. Brousse found evidence of otalgia secondary to temporomanadibular joint arthralgia/arthritis which he attributed to Claimant's clenching and grinding of his teeth as opposed to an injury to this area and recommended referral to a dental practioner who was familiar with treatment and evaluation of temporomandibular joint problems. However, Dr. Brousse found no work impairment associated with this problem and nothing to preclude Claimant from returning to his former work. (EX-11).

On September 22, 2004, Claimant saw oral and maxillofacial dentist, Dr. Edward Boos, who after examining Claimant found mild to moderate myalgia or he right mastication muscles with a good range of motion and no signs of internal temporomandibular joint derangement. Dr. Boos recommended physical therapy including occlusal splint therapy by a dentist but no work restrictions despite Claimant's complaints to the contrary. (EX-12). On September 29 and October 1, 2004, Claimant underwent a functional capacity evaluation which showed Claimant capable of medium level work. (CX-18).

Following the hearing Claimant underwent another evaluation by Board eligible, neurosurgeon, Dr. Najeeb M. Thomas at Claimant's request. Claimant reported TMJ problems and pain on the side of his face radiating into his head. Claimant had some paraspinal muscle spasm with pain radiating into the shoulder. Dr. Thomas ordered a cervical MRI which showed minimal degenerative changes with a left disc protrusion at C5-6 and bone imaging tomographic spect scans showing degenerative disc changes at the midcervical spine anteriorly at C4-5 and mild degenerative changes of the left shoulder. (CX-11, 12).

**B. Claimant's Testimony**

Claimant testified that on October 7, 2002 he was struck by a pallet board on the right side of his head, face, ear, jaw neck and shoulder causing him severe pain in regions. (Tr. 18). Thereafter he was evaluated by Dr. Naccari who order a drug

screen as well as by Drs. Steiner and eventually Dr. Bourgeois. Claimant continued working driving trucks for about a week until October 14, 2002 when he got the results of positive drug testing and not allowed to continue work per employer and union work rules. Thereafter, he was placed on temporary total disability effective November 21, 2002 when Dr. Steiner issued a report restricting Claimant from regular duty. (EX-6; Tr. 27, 33-34). Claimant went to therapy and eventually surgery in January, 2003, followed by additional therapy. (Tr. 18-23).

Despite the surgery and therapy, Claimant contends that he continues to experience severe and disabling head, neck, and shoulder pain running down into the arm. To alleviate the pain Claimant takes Excedrin tension headache medicine or Excedrin extra strength, tries to keep still and sleep when able to do so on apparently rare occasions. (Tr. 25). Claimant testified that he saw oral surgeon Dr. Boos in 2004, diagnosed TMJ and prescribed therapy which he had for only two weeks and helped but that he needs a longer plan of such therapy. (Tr. 26).

Claimant testified that there is no light longshore work and that on occasion as a longshoreman he had to lift in excess of 60 pounds but on such occasions two persons will be used to lift such objects. (Tr. 27). Claimant denied taking any cocaine the weekend before the accident, but had used cocaine in 2001 at a birthday party. (Tr. 28).[3] Claimant admitted having neck pain before as a result of accidents but it was relieved by therapy. Claimant denied having head pain except for an occasional headache. (Tr. 29).

On cross Claimant admitted having good visibility the day of the accident, being able to see the pallet board located just a few feet in front of him before he opened the container door, and allegedly trying to be cautious when opening the container doors. Claimant denied taking any cocaine after the accident and before the drug screen which took place at about 3 pm. (Tr. 30-32). Following the accident Claimant worked about 1 week, eight hours per day until notified by the

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[3] Claimant's denial of cocaine use prior to the accident was not only refuted by the positive drug screen but also by the report of pharmacology and toxicology expert, Dr. William George who reviewed the drug testing and stated that Claimant was an active user of cocaine and according to the test results used cocaine within 24-36 hours of the test and that more likely than not experienced both direct and indirect effects of the drug use including initial euphoria, excitement, mood changes, nervousness and aggressiveness, altered reaction time and vision, followed by apprehension, depression, fatigue, and impaired concentration.

union that his card had been pulled because he had tested positive for cocaine. (Tr. 33, 34).

Claimant testified that he told Dr. Naccari about hurting his head, jaw, ear, neck, and shoulder but admitted that Dr. Nacarri's initial report had no mention about any injury or pain of the head, ear, jaw or side of face allegedly because he was only interested in dealing with neck and shoulder complaints. Claimant saw Dr. Nacarri two more times the same week and yet his reports make no reference to the head, ear, and jaw of side of face. Claimant testified that subsequently he report his complains dealing with his head, jaw, ear and side of face, neck and shoulder but had no explanation why only neck and shoulder complaints were mentioned until a subsequent exam in August, 2004. (Tr.35-38, EX-6, pp.5, 6).

Claimant also testified reporting head, ear, jaw, and side of face complaints on each visit to Dr. Bourgeois, but had no explanation for a lack of such documentation on 9 visits from January 17, 2003 through November 3, 2003. Claimant further had no explanation of Dr. Bourgeois's records of a February 10 visit, wherein Dr. Bourgeois noted a recent mentioning of persistent right side head and neck pain since the accident. (Tr. 39).

Claimant admitted that Dr. Brousse told him his jaw problems did not keep him from working, but denied Dr. Boos told him his jaw problem posed no work restrictions. Claimant also admitted taking a FCE and being able to lift 50 pounds, but only after a lot of straining. (Tr. 42, 43). Further, he admitted that Dr. Bourgeois had approved courier, toll collector, delivery driver, garage/valet cashier, and fork lift operator positions as of October 18, 2004 and that he had 5 prior accidents wherein he retained attorney and filed suit for neck and back injuries. (EX-20; Tr. 44, 45).

**C. Employer Witnesses'Testimony**

Max Russell Sanders, Jr., terminal manager for Employer, testified that following Claimant's injury he made accommodations for Claimant at the terminal by assigning him lighter duty driving jobs paying pre-accident wages. Claimant did this work for about a week following the accident until forced to leave the job when he tested positive for cocaine. Notwithstanding the positive drug test, Claimant would not have been able to work past November, 2002, when Dr. Naccari took Claimant off work. (Tr. 50-54).

Claims adjuster, Steven J. Smith, testified that Claimant was not paid compensation from November 7 through November 21, 2002, because during that period he was working lighter duty truck driving assignments without loss of pay. Thereafter, he was paid temporary total disability benefits until October 11, 2004 based on Dr. Bourgeois assessment of April 16, 2004 that Claimant was cleared from a orthopedic standpoint to return to his old job (subsequently modified on September, 2004 to lifting 60 pounds), plus a May 10, 2004 assessment by Dr. Brousse that Claimant's TMJ did not limit his work ability, plus a labor market survey of October 11, 2004 identifying 5 jobs Claimant could perform at which point Claimant was reduced to permanent partial disability. (Tr. 55-65).

Ms. Nancy T. Favaloro testified about a vocational rehabilitation report which she issued on October 11, 2004, in which she evaluated Claimant's educational and work background and medical information including assessments from Drs. Naccari, Steiner, Bourgeois, Brousse and Boos, performed vocational testing and identified the following jobs which Claimant could perform at the light exertional level with no overhead work: courier (driving a company vehicle and delivering paperwork with alternate sit/stand/walk, lifting limited to 20 pounds, paying $8.00-$9.75 per hour without experience); toll collector (collecting tolls from motorist with sit/standing as desired, lifting limited to 15 pounds twice a day, paying $9.21 per hour); delivery driver ( delivering dental appliances to dentists' offices throughout the city with alternate sit, stand, and walk, lifting 5 to 10 pounds, paying $6.50 per hour; garage/valet cashier maintaining files reflecting where vehicle are parked, correctly filing out parking tickets, operating a cash register, paying $8.00 per hour); and fork lift operator (operating a fork lift moving 55 gallon drums, keeping an inventory of drums and sitting on a fork lift and using upper and lower extremities to operate machine, paying $7:50 to $9.50 per hour); custodian (providing basic housekeeping in a casino setting, lifting limited to 35 pounds and on occasion up to 50 pounds, standing and walking throughout shift, paying $7.00 per hour). Ms. Favaloro testified that Dr. Bourgeois approved all jobs, with Dr. Steiner approving all jobs except custodian. (Tr. 66-73).

**D. Testimony of Drs. Bourgeois, Thomas and Boos**

Dr. Bourgeois testimony followed his medical records as noted above. Dr. Bourgeois testified that his records do not initially contain any complaints of head or jaw pain, but rather merely indicated Claimant was struck on the right side of the head and neck. (EX-10, p. 7). After operating on Claimant and seeing him on number of post-surgery visits, Dr. Bourgeois released Claimant to light duty on September 2, 2003. (EX-10, p. 13). Claimant first reported head and facial pain

on that visit and other than the first visit made no mention of neck pain. (EX-10, p. 15). As of April 6, 2004 Dr. Bourgeois opined that with regard to the right shoulder he should be able to return to work and that an FCE was unnecessary. (EX-10, pp. 18, 19). Later, Dr. Bourgeois limited Claimant to lifting 0 pounds with the right arm. (EX-10, p. 21).

Dr. Thomas, who is Board eligible in neurosurgery, testified that he saw Claimant on one occasion, March 23, 2005, obtained a medical history from Claimant and ordered an MRI, flexion and extension films, and a spec scan and performed a clinical examination. Neurologically his reflexes were normal with no decrease in neck motion but with some palpable pain and tenderness to the right side of the neck with some spasm on the right. (CX-9, p. 7). Dr. Thomas opined that Claimant may have some underlying neck pathology. The previous MRI of October 24, 2002 showed a diminished lordotic curse indicating of neck spasm. (CX-10, p. 10). Dr. Thomas was unable to assess work limitations and admitted being dependent upon Claimant for the symptoms he reported, but that he would find it difficult to relate symptoms to the accident where symptoms were not reported for over a year. Further FCEs were a valuable tool to provide an objective basis of what Claimant could do and that Claimant did not relate any symptoms of the right shoulder or neck prior o October, 2002. (CX-10, p. 15).

Dr. Boos, who is a Board eligible, oral maxillofacial surgeon, testified that he examined Claimant on September 20, 2004. Claimant reported having facial pain several weeks after the accident. The examination show evidence of periodontal disease with complaints of moderate to marked tenderness of the right temporalis, lateral pterygoid and masseter muscles and mild tenderness to palpation of the left temporalis, lateral pytergoid and massester muscles. Claimant also complained of neck pain with tenderness of the right sternocleidomastoid muscle upon palpation. There was no objective medical evidence of anything causing the alleged facial pain. (EX-13, p. 10). Dr. Boos testified that he did not think the alleged facial pain was directly related to trauma and appear a year later, but rather could be caused indirectly to the accident by parafunctional habits such as grinding of teeth due to stress, but such a condition would not preclude work and require physical therapy. Dr. Boos found Claimant to be exaggerating symptoms. (EX-13, pp 14-17).

## IV. DISCUSSION

### A. Contention of the Parties:

Claimant contends that: (1) the October 7, 2002 accident caused both shoulder, neck and ear pain; (2) the drug test is invalid because there is no evidence to show that the medical reviewing officer contacted Claimant to discuss the positive test results; (3) cocaine intoxication is not a defense because there is no evidence from Dr. George's report that Claimant's injury was not due solely to cocaine use; (4) Claimant is entitled to temporary total disability from October 12, 2002 to present and continuing because recent diagnostic studies show disc pathology and that coupled with his complaints of pain prevent any type of work; (5) Claimant has never received adequate treatment for his head, neck, and ear pain including physical and splint therapy as recommended by Dr. Boos.

Employer contends that: (1) it paid and is paying all the benefits which Claimant is due including temporary total disability benefits until he reached maximum medical improvement for his shoulder and thereafter permanent partial benefits based upon a retained earning capacity as determined through Ms. Favaloro's labor market survey; (2) Claimant's denial of cocaine use is a lie; (3) Claimant's complaints of facial and head pain did not surface until more than a year after the accident and are not related to the accident; (4) the alleged facial and head pain does not preclude Claimant from working; (5) no physician has found Claimant unable to work; (6) Claimant has not applied for any jobs since the accident even one approved by his treating physician.

**B. Credibility and Section 20 (a) Presumption**

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh. denied*, 391 U.S. 929 (1968); *Todd Shipyards Corporation v. Donovan,* 300 F.2d 741 (5th Cir. 1962); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co., v. Bruce,* 551 F.2d 898, 900 (5th Cir. 1981).

It has been consistently held that the Act must be construed liberally in favor of the claimant. *Voris v. Eikel,* 346 U.S. 328, 333 (1953); *J.B. Vozzolo, Inc., v. Britton,* 377 F.2d 144 (D.C. Cir. 1967). The United States Supreme Court has determined, however, that the "true doubt" rule which resolves factual doubt in favor of a claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556 (d) and that the proponent of a

rule or position has the burden of proof. *Director, OWCP, v. Greenwich Collieries,* 512 U.S. 267, 114 S. Ct. 2251 (1994), *aff'g* 990 F.2d 730 (3rd Cir. 1993).

In this case, I was not impressed by Claimant's testimony relative to head, neck, ear, and jaw pain and find such testimony as well as his denial of cocaine use prior to the injury to be incredible. Claimant made no initial report of such pain and waited for over a year before reporting such alleged problems. While Claimant asserted he told Drs. Naccari, Steiner, and Bourgeois about head, neck ear and jaw pain when seeing them shortly after the accident, none of their reports contain any mention of such pain. Claimant not only failed to initially report these alleged symptoms, he also failed to disclose 5 prior accidents involving head and back injuries and even misrepresented to Dr. Steiner an absence of prior neck and shoulder problems although treated by Dr. Laborde in 1997, 1998, and 1999 for such problems. (EX-14).

Once Claimant has carried his burden of establishing the existence of a prima facie case, he is entitled to rely on the presumption supplied by Section 20(a) of the Act. Section 20(a) provides:

> In any proceeding for the enforcement of a claim for compensation under the Act it shall be presumed, in the absence of substantial evidence to the contrary—
>
> (a) That the claim comes within the provisions of this Act.

33 U.S.C. § 20(a).

This presumption functions to link the harm suffered by Claimant to his employment. Noble Drilling v. Drake, 795 F.2d 478 (5th Cir. 1986); Hampton v. Bethlehem Steel Corp., 24 BRBS 141 (1990). The Section 20(a) presumption shifts the burden to Employer to come forward with substantial countervailing evidence that the injury or harm was not caused by Claimant's employment. *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989); *Brennen v. Bethlehem Steel*, 7 BRBS 947 (1978). Thus, once the presumption applies, the relevant inquiry is whether Employer has succeeded in establishing the lack of a causal nexus. *Dower v. General Dynamics Corp.,* 14 BRBS 324 (1981). When there has been a work-related accident followed by an inquiry, the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of

Section 20(a) of the Act. *Stevens v. Todd Pacific Shipyards Corp.,* 14 BRBS 626 (1982), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. denied*, 467 U.S. 1243 (1984). If Employer fails in this attempt, Claimant may properly rely on the Section 20(a) presumption to link his injury with his employment. If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers,* 296 U.S. 280, 56 S. Ct. 190 (1935); *Volpe v. Northeast Marine Terminals*, 671 F.2d 297 (2d Cir. 1982).

The Act provides a presumption that a claim comes within the provisions of the Act. See 33 U.S.C. § 920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. *Golden v. Eller & Co.,* 8 BRBS 846 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980); *Anderson v. Todd Shipyards, supra*, at 21; *Miranda v. Excavation Construction, Inc.,* 13 BRBS 882. (1981).

In the present case the Section 20 (a) presumption clearly links the shoulder and neck injury to the October 7, 2002 injury. Regarding the head and neck pain I find no credible testimony or evidence to link such pain to the October 7, 2002. However, even assuming that the Section 20 (a) presumption applies, I find Employer rebutted it by the medical evidence showing no report of such a problem for more than a year after the October 7, 2002 injury. Indeed, the only linkage of such pain comes from Claimant's testimony which I find incredible.

**C. Nature and Extent of Injury**

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial).

A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.,* 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.,* 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.,* 22 BRBS 155, 157 (1989). The traditional

approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached so that a claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping, 22 BRBS 87, 91 (1989). Care v. Washington Metro Area Transit Authority,* 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. *Lozada v. General Dynamics Corp.,* 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers,* 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.,* 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.,* 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority,* 13 BRBS 446 (1981).

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a prima facie case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 1038, 14 BRBS 156 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977); *P&M Crane Co., v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv., v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.,* 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.,* 19 BRBS 171 (1986).

Once the prima facie case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS 1 (CRT)(D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.,* 25 BRBS 128 (1991). An employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. An employer can meet its burden by offering the

injured employee a light duty position at its facility, as long as the position does not constitute sheltered employment. *Darden v. Newport News Shipbuilding & Dry Dock Co.,* 18 BRBS 224 (1986). If the employer does offer suitable work, the judge need not examine employment opportunities on the open market. *Conover v. Sun Shipbuilding & Dry Dock Co.,* 11 BRBS 676, 679 (1979). If employer does not offer suitable work at its facility, the Fifth Circuit in *Turner*, established a two-pronged test by which employers can satisfy their alternative employment burden:

> (1) Considering claimant's age, background, etc., what can claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within this category of jobs that a claimant is reasonably capable of performing, are these jobs reasonably available in the community for which the claimant is able to compete and he could realistically and likely secure? This second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job.

661 F.2d at 1042; *P&M Crane*, 930 F.2d at 430.

If the employer meets its burden by establishing suitable alternative employment, the burden shifts back to a claimant to prove reasonable diligence in attempting to secure some type of alternate employment shown by the employer to be attainable and available. *Turner*, 661 F.2d at 1043. Termed simply, the claimant must prove a diligent search and the willingness to work. *Williams v. Halter Marine Serv.,* 19 BRBS 248 (1987). Moreover, if claimant demonstrates that he diligently tried and was unable to obtain a job identified by the employer, he may prevail. *Roger's Terminal & Shipping Corp., v. Director, OWCP,* 748 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986). If a claimant fails to satisfy this "complementary burden," there cannot be a finding of total and permanent disability under the Act. *Turner*, 661 F.2d at 1043; *Southern v. Farmers Export Co.,* 17 BRBS 64 (1985).

Even a minor physical impairment can establish total disability if it prevents the employee from performing his usual employment. *Elliot v. C & P Tel. Co.,* 16 BRBS 89, 92 (1984); *Equitable Equip. Co., v. Hardy,* 558 F.2d 1192 (5th Cir. 1977). Claimant's credible complaints of pain alone may be enough to meet this burden. *Golden v Eller & Co.,* 8 BRBS 846 (1978), *aff'd,* 620 F.2d 71 (5th Cir.

1980). If a claimant's physical injury leads to psychological injuries, a finding of permanent total disability may be warranted. *Parent v. Duluth, Missabe & Iron Range Railway Co.,* 7 BRBS 41 (1977); *Mitchell v. Lake Charles Stevedores,* 5 BRBS 777 (1977). Once a claimant makes a *prima facie* showing the burden shifts to the employer to show suitable alternative employment. *Clophus v. Amoco Pro. Co.,* 21 BRBS 261 (1988). A failure to prove suitable alternative employment results in a finding of total disability. *Manigualt v. Stevens Shipping Co.,* 22 BRBS 332 (1989); *MacDonald v. Trailer Marine Transp. Corp.*, 18 BRBS 259 (1986).

In this case the parties stipulated and I find that Claimant reached MMI for the shoulder injury on January 26, 2004. Employer continued paying total disability benefits up through October 11, 2004 when Employer established the availability of 5 jobs (courier, toll collector, delivery driver, garage/valet, fork lift operator and custodian). All of these jobs were suitable for Claimant and within the restrictions set by Drs. Steiner and Bourgeois and the FCE. Even Dr. Thomas, who saw Claimant on only one occasion and relied upon Claimant's pain complaints thought Claimant could do some type of work while reserving judgment until he reviewed more recent diagnostic testing, but thereafter making no further comment. Even assuming some head, ear and jaw problems, Claimant could still perform these jobs per Dr. Boos.

Once establishing suitable alternative jobs Employer properly reduced Claimant to permanent partial disability paying him $321.50 per week based upon an earning capacity reflecting the average paid by the jobs identified in labor market survey. Thereafter, Claimant made no attempt to find work or apply for any of these positions. Although Employer paid for additional diagnostic testing and treatment for head, jaw and ear pain, Employer is not obligated to continue such treatment inasmuch as Claimant's problem in these areas is not job related.

The only remaining issue is whether Claimant is entitled to any disability payment from October 7, 2002 to November 21, 2002 when placed on temporary total disability. Claimant testified that from October 7 to 14, 2004 he continued to work performing regular longshore driving work with the distinction that he was assigned to switch trucks from trailer to trailer, rather than just parking them in the yard. Claimant testified that he performed this work despite severe and constant shoulder pain. I credit this testimony because it is consistent with the medicals and find Claimant entitled to temporary total disability from October 7 through October 14, 2002. *Dodd v Crown Central Petroleum Corporation*, 34 BRBS 85 (2002); *Argonaut Ins. Co., v Patterson,* 846 F. 2d 715 (11$^{TH}$ Cir. 1988). From October 15, 2002 through November 21, 2002, Claimant was not allowed to work even in

extreme pain due to the fact he tested positive for cocaine. Inasmuch as the record does not show that Claimant's injury was due solely to cocaine intoxication, the Section 920 (a) presumption has not been overcome, and Claimant is entitled to compensation for this period. *Sheridon v. PetropDrive, Inc.,* 18 BRBS 57 (1986); *Oliver v. Murry's Steaks,* 17 BRBS 105 (1985).

## V. INTEREST and ATTORNEY FEES

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.,* 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co*., aff'd in pertinent part and rev'd on other grounds, sub nom. *Newport News v. Director, OWCP,* 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills..." *Grant v. Portland Stevedoring Company, et al.,* 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.,* 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

## V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from October 7, 2002 to November 21, 2002 based on a stipulated average weekly wage of $807.45.

2. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries to Claimant neck and shoulder pursuant to Section 7(a) of the Act.

3. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

4. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

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CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE